DORA JOYCE PRIETO
v.
ACTING AREA DIRECTOR, SACRAMENTO AREA OFFICE,
BUREAU OF INDIAN AFFAIRS

IBIA 83-2-A Decided March 22, 1983

Appeal from a determination of the Acting Area Director, Sacramento Area Office, Bureau of Indian Affairs, terminating the Indian trust status of certain acquired land.

Vacated and remanded.

1. Indian Lands: Acquired Lands

The discretion given to the Secretary of the Interior under 25 U.S.C. § 409a (1976) to approve the acquisition of certain lands in Indian trust or restricted status encompasses the power to reconsider the approval of such an acquisition when it appears that approval may have been granted through fraud or misrepresentation.

2. Indian Lands: Acquired lands

Once reconsideration of approval of an acquisition of land in Indian trust or restricted status in accordance with 25 U.S.C. § 409a (1976) is properly undertaken and the requirements of due process are met, conclusive evidence that the transaction did not meet the statutory or regulatory requirements provides grounds for termination of the trust or restricted status.

3. Indian Lands: Acquired Lands--Indians: Fiscal and Financial Affairs

Under 25 U.S.C. § 409a (1976), the funds used to purchase land to be held in trust in order to replace Indian trust or restricted lands taken for a public purpose or voluntarily sold by the Indian

owner must be shown to have been derived from the prior taking or sale of such trust or restricted lands.

4. Bureau of Indian Affairs: Generally--Statutes

The Board of Indian Appeals will remand a case to the Bureau of Indian Affairs under 43 CFR 4.337(b) when legislation is passed during the pendency of an appeal that potentially gives the BIA discretionary authority to take action relative to the basis for the appeal.

APPEARANCES: Barton C. Gaut, Esq., Riverside, California, for appellant Dora Joyce Prieto; Glenn R. Salter, Esq., Deputy County Counsel, Riverside, California, for intervenor Riverside County, California. Counsel to the Board: Kathryn A. Lynn.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HORTON

On July 30, 1982, Dora Joyce Prieto (appellant), through counsel, Barton C. Gaut, Esq., Riverside, California, filed a notice of appeal from a July 2, 1982, decision of the Acting Area Director, Sacramento Area Office, Bureau of Indian Affairs (BIA). That decision held that the Indian trust status of certain land acquired by appellant should be terminated. For the reasons discussed below, the Board vacates the Area Director's decision and remands the matter to the BIA for further action in accordance with this opinion.

Background

Appellant is an enrolled and allotted member of the Agua Caliente Reservation of the Palm Springs Cahuilla Indians. During 1980, through counsel, she negotiated the purchase of 55 acres of land, more or less, from the Southern Pacific Transportation Company. This acreage consisted of a strip of land approximately three miles long and 100 feet wide, lying between the Southern Pacific Railroad right-of-way and Interstate Highway 10 in Riverside County, California. The land is adjacent to the Agua Caliente Reservation, but was not, before its purchase by appellant, Indian trust or restricted land.

Because appellant wished to place this property in Indian trust status, the acquisition was submitted to the Bureau of Indian Affairs for approval under the provisions of 25 U.S.C. § 409a (1976) 1/ and 25 CFR Part 151

1/ Section 409a states in pertinent part:

"Whenever any nontaxable land of a restricted Indian * * * is sold under existing law to any * * * person or corporation [other than a governmental entity] for other [than public] purposes, the money received for said land may, in the discretion and with the approval of the Secretary of the Interior, be reinvested in other lands selected by said Indian, and such land so selected

(formerly Part 120a). 2/ The acquisition was reviewed and approved by the Director of the Palm Springs Field Office, BIA, and indenture to the United States in trust for appellant was recorded on February 19, 1981.

On November 25, 1981, the County of Riverside (County), through its County Counsel, filed a notice of appeal from the BIA's decision to place this land in trust. The crux of the County's appeal was that no statutory basis existed for taking the land into trust because the funds for its purchase were not derived from the sale of other trust or restricted lands as required under 25 U.S.C. § 409a. The County alleged that it could appeal because it was given inadequate notice of the intention to place the property in trust status.

On March 5, 1982, the Acting Area Director, Sacramento Area Office, BIA, informed the County by letter that it did not have the right to appeal the decision. However, the letter stated that the notice would be treated as a complaint requesting reconsideration or correction of the decision, see 25 CFR 2.2, and that the decision was being administratively reconsidered. Although advised of the right to do so, the County did not appeal this decision.

On March 26, 1982, the Acting Area Director issued appellant a notice to show cause why the trust status of the property should not be terminated. The notice stated:

> I have reviewed your Individual Indian Money Account * * *. The records reveal that the funds used for the purchase of the subject property were not received from the sale of trust or restricted lands.
>
> You are, therefore notified that unless proof or evidence is offered tracing such purchase money for the subject property to funds received from the sale of trust or restricted lands, the * * * property so acquired is subject to loss of its trust status.

---

fn. 1 (continued)
and purchased shall be restricted as to alienation, lease, or incumbrance, and nontaxable in the same quantity and upon the same terms and conditions as the nontaxable lands from which the reinvested funds were derived, and such restrictions shall appear in the conveyance."

All further citations to the United States Code are to the 1976 edition.

2/ Former Part 120a was redesignated as Part 151 by notice published in the Federal Register. 47 FR 13327 (Mar. 30, 1982). No substantive changes were made to former Part 120a. This opinion will cite only to Part 151.

Part 151 provides that "[l]and not held in trust or restricted status may only be acquired for an individual Indian * * * in trust status when such acquisition is authorized by an act of Congress * * * [and] is approved by the Secretary." 25 CFR 151.3. The Secretary has required that seven factors be considered in evaluating each request for the acquisition of land in trust status. See 25 CFR 151.10. The only factor which appears to be at issue in this case is "[t]he existence of statutory authority for the acquisition and any limitations contained in such authority." 25 CFR 151.10(a).

Appellant responded to this notice by affidavit on May 13, 1982. Her affidavit essentially consisted of legal argumentation. Appellant stated that between 1958 and 1979 she sold a total of approximately 67 acres of trust land through five separate sales. She contended that 25 U.S.C. § 409a permitted her to replace those 67 acres with the 55 acres she had recently acquired. Appellant argued that her decision not to use her Individual Indian Money (IIM) account in all but one of the prior sales should not deprive her of the right to replace sold trust land, because as a competent adult she was not required to use an IIM account. Furthermore, she alleged that section 409a did not require that funds used to purchase replacement land be traced to their ultimate source, and that tracing would be impossible in any event because of the commingling of funds and the change in form resulting from the use of the funds.

On July 2, 1982, the Acting Area Director determined that the purchased property did not come within the provisions of 25 U.S.C. § 409a. The decision letter stated:

> My determination is based on your statement of not being required to avail yourself to the Bureau-controlled Individual Indian Money Accounts by preference and the fact that the money, $46,120.00, used to purchase the land was from your personal banking account and voluntarily deposited with the Palm Springs Office with instructions to release said money to the Safeco Title Insurance Company for the purchase of the land. Moreover, the Code of Federal Regulations, Title 25, part 104.6 [now Part 115.6], addressing voluntary deposits, provides for exceptions only in situations "to avoid substantial hardships" which was not a determinant factor in this case. In the acquisition of lands in a trust or restricted status, the Secretary of the Interior must look to some authority which calls for his approval, or in the absence of specific legislation, he must be able to point to some control over the money used in an acquisition. The money used to purchase the land, $46,120.00, was a voluntary deposit and cannot qualify as trust or restricted funds, for the purpose of the Act.

Appellant timely appealed this decision to the Deputy Assistant Secretary--Indian Affairs (Operations) on July 30, 1982. This appeal was transferred to the Board of Indian Appeals pursuant to 25 CFR 2.19(a)(2) on October 26, 1982. Briefs on appeal have been filed by appellant and by Riverside County. 3/

Discussion and Conclusions

The first question before the Board is whether the Secretary has authority to reconsider and revoke his approval of an acquisition of land in trust. Appellant argues that once land has been formally accepted in trust by the Secretary under 25 CFR 151.13, there is no authority to reconsider and revoke this acceptance. She further notes that she has detrimentally relied upon the Secretary's approval.

3/ Riverside County was granted intervenor status in this appeal pursuant to 43 CFR 4.313 by Board order of Nov. 2, 1982.

[1] Appellant is correct that the regulations in Part 151 do not provide a formal means for reconsideration. Reconsideration, therefore, must be justified under other legal authority. Because legally recognized property interests arise through the Secretary's approval, reconsideration should not be undertaken lightly. In this case, the decision to reconsider was based on evidence suggesting the possibility that approval may have been obtained through fraud or misrepresentation. 4/ It is well established that "the law * * * abhors fraud," Boyce's Executors v. Grundy, 28 U.S. (3 Pet.) 210, 220 (1830), and will provide a remedy for it. See generally Blachly v. United States, 380 F.2d 665 (5th Cir. 1967); Weiss v. United States, 122 F.2d 675 (5th Cir. 1941). The Board does not here find that the elements of fraud were clearly present in this case. However, it is the Board's opinion that the discretion granted to the Secretary under section 409a is sufficiently broad to provide a remedy, through reconsideration, when it appears that a land acquisition in trust may have been approved through fraud or misrepresentation.

[2] Once reconsideration is properly undertaken, due process requires that persons potentially affected by reconsideration be given an opportunity to be heard. Conclusive evidence that the transaction did not meet the statutory or regulatory requirements then provides grounds for termination of the trust status. It is immaterial whether the initial erroneous decision was made as a result of misrepresentation, mistake, or for some other legally sufficient reason. An individual's statutory rights cannot be enlarged by the mistake of a Federal employee, see Grant Kirkham, 58 IBLA 131 (1981), any more than by concealment or active misrepresentation of relevant facts.

On reconsideration, BIA determined in essence that approval for appellant's acquisition in trust had been given under a mistake of fact as to the source of the money used to purchase the replacement property. As BIA interpreted section 409a, a finding that purchase money did not derive from a prior taking or sale of trust or restricted lands rendered the acquisition ineligible for being taken in trust.

The question posed by this case is the proper construction of 25 U.S.C. § 409a. In Caminetti v. United States, 242 U.S. 470, 490 (1916), Mr. Justice Day stated one of the most fundamental rules of statutory construction:

> [W]hen words [in a statute] are free from doubt they must be taken as the final expression of the legislative intent, and are not to be added to or subtracted from by considerations drawn from titles or designating names or reports accompanying their introduction, or from any extraneous source. In other words, the language being plain, and not leading to absurd or wholly impracticable consequences, it is the sole evidence of the ultimate legislative intent.

4/ The Director of the Palm Springs Field Office, who had approved the acquisition in trust, informed the Sacramento Area Director by letter dated Dec. 24, 1981, that "[a]s I stated on December 15, 1981, the representation was made to this office that the funds which Dora Prieto deposited with this office on October 24, 1980, were traceable land sale funds." See Attachment 8 to Administrative Record.

The Board thus looks first to the language of section 409a in determining its meaning.

On first examination, the general intent of Congress regarding the source of funds for purchasing replacement property appears to be clear and unambiguous. Section 409a states that "the money received for * * * [trust or restricted] land may * * * be reinvested" and that the new land will receive the same treatment as the "lands from which the reinvested funds were derived." It would thus appear that Congress intended to permit the replacement of trust land with proceeds derived directly from the prior taking or sale of that land.

Appellant's arguments, however, suggest that the statute as thus interpreted leads to an absurd result. Appellant argues that this interpretation requires the use of the exact dollars received from a sale for the purchase of replacement land. According to appellant, this requirement would prevent an Indian who sold trust land, but was forced to use the proceeds for other purposes, such as a medical emergency, before replacement property could be purchased, from benefitting under the statute. Specifically, she contends that, because the use of an IIM account is nowhere generally required for a competent adult, and particularly is not required either by section 409a or its implementing regulations, the failure to use such an account should not be sufficient grounds for finding an Indian ineligible to replace trust or restricted property. Furthermore, she alleges that the use of funds derived from a sale before replacement property was purchased would frequently result in commingling those funds with funds derived from other sources, including, perhaps, non-trust sources. Appellant argues that, if BIA's tracing requirement were to be upheld, such commingling and the probable change in form of the funds through investment or other uses, would prevent any Indian not leaving the funds in an IIM account from ever replacing trust or restricted lands, in direct opposition to the expressed Congressional intent.

Appellant has examined the legislative history of 46 Stat. 1471 and 47 Stat. 474, the two enactments which resulted in the present language of section 409a. She states that Congress at no time expressed a requirement that funds used to purchase replacement land be directly traced to the sale of trust or restricted land. Appellant concludes that when an Indian has sold trust or restricted land in an amount greater than or equal to the amount of replacement land purchased, and inferentially for a price greater than or equal to the price of the purchased land, that person is eligible to have the replacement land placed in trust or restricted status, provided the other considerations are met, without any showing of the specific source of the purchase money or the disposition of the funds derived from the prior sale.

Congress did not enact section 409a in a vacuum. In 1924 the Supreme Court considered whether the United States had the power to restrict alienation of land purchased with the proceeds of the sale of restricted land. Sunderland v. United States, 266 U.S. 226 (1924) (dealing with the Act of May 27, 1908, 35 Stat. 312). It was argued in that case that Congress had only provided a restriction upon alienation of allotted lands and that such a restriction could not be imposed administratively upon purchased lands. The Court stated:

> When the general protective policy of Congress in dealing with the Indians is borne in mind, it reasonably cannot be doubted that the authority conferred upon the Secretary to make rules concerning the "disposal of the proceeds [of the sale of allotted land] for the benefit of the respective Indians" is broad enough to justify the rule in question. Since the allotted lands could not be sold or encumbered without his consent and since the proceeds of any sale thereof were subject to his control and could only be disposed of with his approval and under such rules as he might prescribe for the benefit of the respective Indians, the extension of such control to the property in which the proceeds were directly invested would seem to be within the statute fairly construed.

Id. at 234-35. The Departmental practice of reinvesting the proceeds from the sale of restricted land in other land which thereby became restricted was thus established prior to the enactment of 25 U.S.C. § 409a. 5/

In commenting upon the Sunderland decision, the Tenth Circuit Court of Appeals examined the policy behind the practice in Ward v. United States, 139 F.2d 79, 82 (10th Cir. 1943):

> In substance, there was a mere conversion of trust property. The restricted allotment was converted into funds and the funds were converted into land. Such land was charged with the same trust as the original allotment,* * * under the well-settled principle of the law of trusts that, whenever property in its original state and form has once been impressed with a trust, no change of that state and form can divest it of its trust character, so long as it remains capable of clear identification. [Footnote omitted.] [6/]

[3] The Board holds that 25 U.S.C. § 409a requires that the funds used to purchase land to replace Indian trust or restricted lands taken for a public purpose or voluntarily sold by the Indian owner, must be shown to have been derived from the prior taking or sale. This requirement may, under the circumstances of a particular case, mean that an individual must trace funds intended for the purchase of replacement property to their ultimate source.

5/ See also United States v. Law, 250 F. 218 (8th Cir. 1918). The court based its decision, that land purchased with the proceeds of a Secretarially approved sale of Indian trust or restricted land could be imposed with the same trust or restrictions, on prior cases holding that the proceeds of the sale of trust or restricted lands retained the status of the land. See National Bank of Commerce v. Anderson, 147 F. 87 (9th Cir. 1906); United States v. Thurston County, 143 F. 287 (8th Cir. 1906).

6/ The result of Congressional deliberation on this issue, a statute providing for reinvestment of funds derived from the sale of trust or restricted land in other land that thereby may acquire the same trust or restricted status, appears to be so similar to prior Departmental practice as explained in Sunderland as to suggest knowledge and acceptance of that practice.

The subsidiary question raised by this holding is what showing is sufficient to prove the source of purchase money. The use of an IIM account for the deposit and maintenance of the proceeds from the sale of trust or restricted lands is the easiest way to prove the source of purchase money. By using this special account, the proceeds can remain distinguishable from funds derived from other sources and retain their trust character. It is most probable that this is the situation Congress envisioned when it enacted the legislation.

Here, BIA gave appellant an opportunity to show that the purchase money for the 55 acres at issue, although under her personal control, was nonetheless derived from the prior sale or taking of trust or restricted lands. Assuming that she had made this showing, BIA apparently considered that the purchase in trust could have been affirmed.

Appellant provided evidence of the sale of apparently 20 acres of trust land located within the Palm Springs Municipal Airport to the City of Palm Springs for $95,541.40. The proceeds of this sale were placed in her IIM account and were available for the purchase of replacement property. An examination of appellant's four remaining sales shows that she applied for and was granted fee patent to the trust land before the sales occurred. 7/ In these four cases, the proceeds from the sales were not paid into her IIM account because the trust character of the lands had been extinguished prior to their sale.

Had appellant left the proceeds from the sale to the City of Palm Springs in her IIM account, these funds would clearly have qualified for the purchase of replacement property under section 409a. The funds were instead disbursed to appellant upon her representation that she intended "to use this money for the development of * * * [her] other lands." See Exhibit B to Supplemental Declaration. Alternatively, if appellant had shown that these funds were not so used or that they constituted all or a portion of the purchase money for the replacement property, they may still have qualified for the purchase of replacement property under 25 U.S.C. § 409a.

Appellant instead stated under oath that the funds used to purchase this land were loaned to her by the Naegele Outdoor Advertising Company of California, Inc. In a deposition taken on December 1, 1981, in the cases of County of Riverside v. California et al., No. 816103 RJK (Tx), and No. INDIO 34191, appellant stated that she received a check from the Naegele company for approximately $46,000 which she deposited in her checking account in a commercial bank. She then wrote a personal check to BIA for deposit in her IIM account to cover the purchase price of the property. Appellant was to repay this loan through revenue generated by allowing the Naegele company to erect advertising signs on the property (Dec. 11 Tr. 5-9, 43). A copy of the agreement between appellant and the Naegele company appears as Exhibit 1 to appellant's deposition. Although appellant asserts she had sufficient funds of her own to purchase the property, she states that she borrowed the money because this procedure was more advantageous to her (Affidavit at 4).

7/ See Exhs. C, D, E, and F to appellant's Sept. 22, 1982, Supplemental Declaration re Appeal from Decision of Acting Area Director (Supplemental Declaration).

The arrangement was confirmed by Mr. Robert Naegele in a deposition taken on February 17, 1982, in case No. INDIO 34191 (Feb. 12 Tr. 20-22).

It is therefore irrelevant how much trust or restricted land appellant may have sold or how much money she may have received from such sales. The purchase money was admittedly derived from the Naegele Outdoor Advertising Company as part of a business venture between appellant and that company, and repayment was intended from the proceeds of that venture. Because there was no connection between the funds used to purchase the property and the sale of trust or restricted lands, appellant's purchase was not eligible to be taken in trust under 25 U.S.C. § 409a.

[4] Subsequent to the BIA's decision that it could not allow appellant's lands to be retained in trust status under authority of 25 U.S.C. § 409a, and during the pendency of this appeal, Congress enacted legislation which seems to authorize the BIA, in its discretion, to accept appellant's property in trust, regardless of the prior character of the land or the nature of funds used to acquire it. Act of Jan. 12, 1983, 98 Stat. 2515, the Indian Land Consolidation Act. Section 203 of the Act applies section 5 of the Act of June 18, 1934, 48 Stat. 985, 25 U.S.C. § 465, to all Indian tribes regardless of whether or not they had organized under other provisions of the 1934 Act, the Indian Reorganization Act (IRA). Section 5 of the IRA gives the Secretary discretion to acquire land in trust for Indians without the restrictions found in 25 U.S.C. § 409a. This section has been interpreted as allowing the Secretary to accept title in trust to land already owned in fee by an individual Indian whether or not the land is located within the boundaries of an Indian reservation. See Chase v. McMasters, 573 F.2d 1011, 1015-16 (8th Cir. 1978).

The BIA has not had an opportunity to consider whether appellant's land acquisition should be taken in trust under this new legislation. Accordingly, despite the Board's finding that the land may be removed from trust status under 25 U.S.C. § 409a, that decision is vacated and this case is remanded to the Deputy Assistant Secretary--Indian Affairs (Operations) in accordance with 43 CFR 4.337(b). The Board suggests that the Deputy Assistant Secretary treat this decision as a request on behalf of the appellant for consideration of whether her prior land acquisition should be taken in trust under the Indian Land Consolidation Act.

_____

Wm. Philip Horton
Chief Administrative Judge

We concur:

_____

Jerry Muskrat
Administrative Judge

_____

Franklin D. Arness
Administrative Judge